Supreme Court, U.S.
FILED
NOV 6 - 2006
OFFICE OF THE CLERK

No. 06-271

In the Supreme Court of the United States

ANDREA SKOROS, individually, and next friend of NICHOLAS TINE, a minor, and CHRISTOS TINE, a minor,

Petitioners,

v.

CITY OF NEW YORK, JOEL L. KLEIN, in his official capacity as Chancellor, New York City Department of Education, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

TABLE OF CONTENTS

Statement in Reply 1

Argument in Reply 2

I. Respondents' Policy Disfavors Christianity in Violation of the Establishment Clause 2

II. The Endorsement Test Is Incapable of Consistent Application and Should Be Abandoned 6

Conclusion 8

TABLE OF AUTHORITIES

Cases

ACLU v. Schundler,
168 F.3d 92 (3d Cir. 1999) 6

County of Allegheny v. ACLU,
492 U.S. 573 (1989) 2, 5, 6

Edwards v. Aguillard,
482 U.S. 578 (1987) 7, 8

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 7

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001) 7

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993) 1

Larson v. Valente,
456 U.S. 228 (1982) 2

Lynch v. Donnelly,
465 U.S. 668 (1984) 2, 3, 5

Van Orden v. Perry,
125 S.Ct. 2854 (2005) 3, 6, 8

Wallace v. Jaffree,
472 U.S. 38 (1985) 8

Constitutional Provision

U.S. Const. amend. I . . . . . *passim*

STATEMENT IN REPLY

The United States Constitution does not require a complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any. Respondents ignore this clear constitutional command and offer a tortured justification for adopting a school district policy that expressly permits Jewish and Islamic religious symbols in year-end holiday celebrations, but bans the similar use of Christian religious symbols. Unfortunately, the majority opinion of the Second Circuit upholding this policy against Petitioners' constitutional challenge was made possible by the unintelligibility of this Court's Establishment Clause jurisprudence. The conflict between the majority and dissenting opinions in this case amply demonstrates that the reasonable observer standard of the endorsement test is incapable of consistent application, and is, therefore, no standard whatsoever. This Court should grant review of this case and abandon this unworkable test in favor of a view of the Establishment Clause that produces results consistent with our Nation's religious heritage—a view which underlies the First Amendment itself. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring) ("What a strange notion, that a Constitution which itself gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.").

ARGUMENT IN REPLY

I. Respondents' Policy Disfavors Christianity in Violation of the Establishment Clause.

The Establishment Clause prohibits "practices suggesting 'a denominational preference.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989) (stating that "strict scrutiny" applies in such cases) (citation omitted); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), a case upholding the public display of a crèche, this Court stated the principle of law applicable here,

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause.

Id. at 673 (internal punctuation, quotations, and citations omitted)(emphasis added).

With regard to the crèche, this Court stated,

> The crèche in the display depicts the historical origins of this traditional event [i.e., Christmas] long recognized as a National Holiday. . . . To forbid the use of this one passive symbol—the crèche—at the

> very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings.

Id. at 680 & 686 (emphasis added).

Moreover, in *Van Orden v. Perry*, 125 S.Ct. 2854 (2005), a case in which a plurality of justices upheld the display of the Ten Commandments on the grounds of the Texas State Capitol, Justice Breyer, in his concurring opinion, stated,

> At the same time, to reach a contrary conclusion here [i.e., removal of the display], based primarily upon the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Id. at 2871 (Breyer, J., concurring) (emphasis added).

Respondents' tortured justification for their discriminatory policy creates the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid. Respondents make the rather innocuous claim that "[t]here is nothing unlawful about a school district setting a policy of only permitting secular symbols of the holiday season." Opp. Br. at 4 (quoting a letter from the Chancellor's counsel). In fact,

the policy states, in relevant part, "The display of secular holiday symbol decorations is permitted." Opp. Br. at 3. Yet, it is undisputed that Respondents' policy permits the display of the menorah during the Jewish holiday of Chanukah and the Islamic star and crescent during the Muslim commemoration of Ramadan, but forbids any display of the nativity—a depiction of the historical origins of Christmas—during this Christian holiday.[1] Opp. Br. at 4-5. Thus, it can hardly be said that this policy only permits the display of secular symbols.

Respondents state further, "This restriction is not unique to the crèche; the guidelines do not permit purely religious holiday displays for other religions, such as religious displays for Rosh Hashanah or Yom Kippur, or images of deities or other religious figures." Opp. Br. at 5. Respondents' assertion is absurd. Is Ramadan any more or less a religious holiday than Rosh Hashanah or Yom Kippur? What images of Islamic or Jewish deities do Respondents have in mind? Is it possible to display any such image without creating great offense to either religion? Why is the menorah—a symbol of a miracle that is central to the Jewish faith—any more or less religious than a simple scene of the nativity, which is a historical event? *See* 119a (dissent) ("Christians likely might

---

[1] Respondents make the wholly exaggerated and quite inaccurate claim that the policy prohibits the "[d]isplay of the crèche, as a representation of the birth of a figure central to the Christian religion, and others worshipping Jesus Christ as the Son of God." Opp. Br. at 5 (emphasis added). In actuality, it is undisputed that Respondents' policy forbids the display of a simple picture of the nativity. *See* App. 157a (picture of the nativity). And it even prohibits students from drawing or coloring pictures of the nativity during classroom instruction, even though students receive books with the menorah for that purpose. *See* App. 15a.

take offense to the statement that a crèche is 'purely religious,' a contention that implicitly rejects the historical nature of the symbol."). How is an official rejection of the historical origins of Christmas serving "the secular, educational purpose of promoting cultural understanding"? Opp. Br. at 4-5. Indeed, when the Establishment Clause is invoked as a justification for a religiously divisive policy such as the one at issue here there is something fundamentally wrong with a jurisprudence that could produce such an inconsistent and bizarre result.[2] *See* Section II, *infra; see also County of Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.").

In the final analysis, Respondent's policy is "unique to the crèche" and, therefore, the Christian holiday of Christmas. It is plainly unreasonable to conclude that this policy does not "suggest a denominational preference" or exhibit disfavor or hostility toward the Christian religion. Such hostility is a violation of the Establishment Clause. *See Lynch*, 465 U.S. at 673.

---

[2] Respondents argue that the policy represents a "reasonable means" for them "to avoid Establishment Clause violations in their schools," noting that they "relied on Supreme Court precedent in devising their policy." Opp. Br. at 13-16; *see also* Opp. Br. at 14 ("The majority explicitly found that [Respondents] made a good faith effort to understand and comply with complex Supreme Court precedents."). The challenged policy itself makes the following disclaimer: "[W]e must be mindful that the Constitution prohibits a school system from endorsing or promoting a particular religion or belief system." App. 9a.

II. The Endorsement Test Is Incapable of Consistent Application and Should Be Abandoned.

Even if three judges sitting on a panel achieve agreement upon who the necessary hypothetical observer in the endorsement test is—an assumption that this case demonstrates is dubious[3]—it is unrealistic to expect different judges to reach consistent answers as to what any observer, the average observer, or the ultrareasonable observer would think. The conflict between the majority and dissenting opinions in this case demonstrates the veracity of this claim.

Indeed, the Second Circuit majority bemoaned the fact that "[t]he passage of time has produced no greater consensus on the Court in resolving First Amendment challenges to public displays of religious symbols," observing, "Government officials attempting to parse these sharply divided public display decisions might be forgiven for occasionally thinking, as do some of the justices, that they confront a 'jurisprudence of minutiae' that leaves them to rely on 'little more than intuition and a tape measure' to ensure the constitutionality of public holiday displays." App. 28a-29a (quoting *County of Allegheny*, 492 U.S. at 674-75 (Kennedy J., concurring in part and dissenting in part)); *see also ACLU v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) (observing that the Supreme Court's religious display decisions "have been marked by fine line-drawing," so that "it is not easy . . . to determine whether particular displays satisfy the Court's standards").

---

[3] *See Van Orden*, 125 S.Ct. at 2867 (Thomas, J., concurring) ("The Court's foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views.").

For example, Respondents claim that the majority did not err by selecting as the reasonable observer a disinterested adult rather than elementary school students (i.e., young and impressionable children) who are subjected to the inherently coercive atmosphere found in public elementary and secondary schools and their parents. Opp. Br. at 10. In support of their contention, Respondents cite to *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) and Justice O'Connor's concurrence in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34 (2004) (O'Connor, J., concurring). But neither case supports the Second Circuit's departure from cases that *should* be controlling under circumstances presented by this case—where the challenged school policy is supported by school teachers during school hours on school premises. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting that students are susceptible to pressure in the classroom, particularly given their reliance on teachers as role models, and stating that when the school is advancing religion, the impressionability of students is relevant to the Establishment Clause issue). In *Good News Club*, this Court distinguished the applicable cases regarding the effect of a school policy on the impressionability of the students because that case involved "individuals who are not school teachers . . . giving lessons after school to children permitted to attend only with parental consent." *Good News Club*, 533 U.S. at 117. Moreover, in *Elk Grove Unified Sch. Dist.*, this Court reversed the Ninth Circuit's decision because the father challenging the school district's policy requiring teacher-led recitation of the Pledge of Allegiance lacked prudential standing. *Elk Grove Unified Sch. Dist.*, 542 U.S. at 17-18. Therefore, Justice O'Connor's discussion of the reasonable person standard in this case is dicta. Nonetheless, the cases cited by Respondents simply serve to further demonstrate the inability of the endorsement test to reach consistent results. *See, e.g., id.* at 45, n.1 (Thomas, J., concurring) ("Our

jurisprudential confusion has led to results that can only be described as silly."); *see generally Edwards*, 482 U.S. at 639 (Scalia, J., dissenting) (criticizing the Court's "embarrassing Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.").

In the final analysis, as Justice Thomas noted in his concurring opinion in *Van Orden*, "The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. . . . [A] more fundamental rethinking of our Establishment Clause jurisprudence remains in order." *Van Orden*, 125 S.Ct. at 2867-68 (Thomas, J., concurring). Petitioners respectfully submit that this case presents an opportunity for this Court to rethink its jurisprudence and to provide much needed guidance that is capable of consistent application to the courts below.

CONCLUSION

As this and many other cases have demonstrated, the Establishment Clause jurisprudence of this Court is in need of substantial revision. This Court should grant review of this case and abandon the endorsement test in favor of a workable standard that is consistent with our Nation's religious heritage and capable of consistent application.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106